

BEFORE THE
Federal Communications Commission
 WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)

Petition for Rulemaking)
 To Add Marion, Indiana)
 To the Indianapolis-)
 Bloomington Designated)
 Market Under 76.51)

Docket No. 93-260

To: Chief, Mass Media Bureau
 STOP CODE 1800

COMMENTS OF RIVER CITY LICENSE PARTNERSHIP

River City License Partnership, licensee of Television Station WTTV, Bloomington, Indiana, and Television Station WTTK, Kokomo, Indiana, ("River City") by its attorneys, hereby submits its comments in opposition to the proposal set forth in the Notice of Proposed Rulemaking in the above-captioned proceeding to amend Section 76.51 of the Commission's Rules to add Marion, Indiana as a designated community of the Indianapolis-Bloomington television market.^{1/}

The Commission's Notice responds to a Petition for Rulemaking filed by Marion T.V., Inc., licensee of Television Station WMCC-TV, Channel 23, Marion, Indiana, ("WMCC-TV") which seeks to amend Section 76.51 of the Commission's Rules by redesignating the Indianapolis-Bloomington television

^{1/} Notice of Proposed Rulemaking, MM Docket No. 93-260, DA 93-1156 (released October 7, 1993)(hereinafter "Notice").

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market as Indianapolis-Bloomington-Marion. According to the petition and Notice, WMCC-TV's primary motivation is evasion of compulsory cable copyright charges associated with its distant signal status on certain Indianapolis-Bloomington cable systems.

WMCC-TV's proposal fails to meet the Commission's criteria for market redesignation. In addition, grant of its petition may cause an irreconcilable conflict with a rulemaking proceeding now pending before the Copyright Office. Thus, River City urges the Commission to reject the proposed modification and to maintain the Indianapolis-Bloomington television market's present designation.

I. WMCC-TV's Proposal Fails to Meet Criteria For Redesignation of a Hyphenated Television Market

WMCC-TV's petition does not satisfy established standards for market redesignations. In 1972, the Commission decided that it should amend the major television market list only in rare circumstances to prevent anomalies.^{2/} Since that time, the Commission has repeatedly stated that in evaluating market hyphenation proposals, it will consider four factors: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a

^{2/} See Cable Report and Order, 36 FCC2d 143, 172 n.37 (1972).

clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change.^{3/} Additionally, the Commission recently indicated that amendment of Section 76.51's market designations is appropriate only where there is "evidence that demonstrates commonality between the proposed community to be added to the market designation and the market as a whole."^{4/} Judged according to these factors, WMCC-TV's market redesignation proposal clearly must be rejected.

A. The Distances from Marion to the Indianapolis-Bloomington Market Weigh Against Redesignation

Contrary to WMCC-TV's assertion, the distances between Marion, Indianapolis and Bloomington militate against adding Marion to the market's designation. "[T]he greater the separation between cities involved, the thinner the common bond allowing both to be considered part of the same market."^{5/} WMCC-TV admits that Marion is some 58 miles distant from Indianapolis and over 100 miles distant from Bloomington. In fact, Marion is over 140 miles away from the farthest edge of the Indianapolis ADI.

^{3/} See, e.g., Major Television Markets (Fresno-Visalia, Cal.), 57 RR2d, 1122, 1123 (1985).

^{4/} Report and Order in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78 (1993).

^{5/} Television Muscle Shoals, Inc., 48 RR2d 1191 (1980), recon denied, 87 FCC2d 567 (1981).

Other market redesignation cases confirm that these distances are fatal to the proposed redesignation. For example, in Television Muscle Shoals,^{6/} the Commission found 75 miles too great a distance to support redesignation. In contrast, the Commission has deemed 10, 30 and 35 mile separations and a 20 mile separation sufficient to support consolidation.^{7/} Even in Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, Florida),^{8/} which WMCC-TV cites for support, the overall distances between the competitors were less than 75 miles.^{9/}

B. WMCC-TV Has Not Shown Commonality Between Marion and the Hyphenated Market

WMCC-TV does not place a Grade B contour over Bloomington; its Grade B contour overlaps the Bloomington 35 mile zone only in portions of two counties, Johnson and Morgan. Only half of the television stations (7 of 14) in the Indianapolis ADI place a Grade B signal over Marion. In fact, Marion is

6/ Id. at 1193.

7/ Major Television Markets (Fresno-Visalia, California), 57 RR2d 1122, 1124 (1985); Press Broadcasting, Inc., 6 FCC Rcd 94 (1992), granted, 7 FCC Rcd 3667 (1993).

8/ 102 FCC2d 1062 (1985).

9/ The Commission found that "the distance between the petitioner and its competitors licensed to Orlando and Daytona Beach is appreciably less than in Television Muscle Shoals." Id. at 692.

actually more proximate to Fort Wayne, Indiana than to Indianapolis.^{10/}

Reflecting on these geographic and demographic realities, WMCC-TV does not have viewership in Indianapolis or Bloomington sufficient to demonstrate commonality with the hyphenated market. Thus, it is hardly surprising that WMCC-TV's petition is entirely devoid of audience data supporting the market redesignation. WMCC-TV also neglects to include any evidence of cultural, social or economic commonality between the markets; instead, it submits nothing more than inferences from syndicators' rates and an unspecified number of Indianapolis advertisers to support its commonality contention. WMCC-TV's proposal must be rejected because of its total failure to establish the requisite commonality.

C. Redesignation Could Accord WMCC-TV Mandatory Cable Carriage Beyond its Grade B Contour

Lack of cable carriage is not preventing WMCC-TV from reaching its natural off-air audience or its potential cable audience. WMCC-TV is already entitled to mandatory cable carriage on those cable systems within the Indianapolis ADI which are also within its actual service area. As WMCC-TV's petition makes clear, it seeks redesignation "simply to ensure that WMCC may enforce its existing carriage rights without payment of prohibitively expensive copyright fees."^{11/} Obviously, WMCC-TV's real complaint is that it must pay

^{10/} Rand McNally Road Atlas, Mileage Between Principal Cities, at 31-32 (1993) (Fort Wayne to Marion = 51 miles; Indianapolis to Marion = 67 miles).

^{11/} Petition at 9.

distant signal copyright license fees for carriage on cable systems more than 35 miles distant from its community of license where WMCC-TV is not significantly viewed. This private interest does not support redesignation.

WMCC-TV's requested redesignation could afford the station mandatory carriage rights well beyond its Grade B contour, on cable systems far distant and in cable communities where WMCC-TV is not significantly viewed. For example, WMCC-TV has no Grade B coverage at all in 13 of the 34 counties in the Indianapolis ADI; WMCC-TV is significantly viewed in only 16 of those 34 counties.^{12/} Apparently, WMCC-TV has not sought to establish its significantly viewed status in those cable communities (perhaps because viewing statistics confirm that is not truly "local" in those communities). Rather, it seeks to avoid those procedures by pursuing television market redefinition. WMCC-TV's attempt to evade established significant viewing requirements should be rejected.

D. WMCC-TV Does Not Demonstrate a Compelling
Need for Market Redesignation

While WMCC-TV may desire "local signal" status throughout the ADI for copyright purposes, market redesignation is not the only recourse for WMCC-TV. For cable systems within its 35 mile specified zone, WMCC-TV is already local; for cable systems outside that zone, WMCC-TV may petition for

^{12/} Boone, Carroll, Clinton, Delaware, Grant, Hamilton, Hancock, Hendricks, Henry, Howard, Johnson, Madison, Marion, Miami, Randolph, and Shelby. 1993 Cable and Station Coverage Atlas (Warren Publishing).

significantly viewed status, as discussed above. Its failure to do so, coupled with its failure to submit any viewing statistics (let alone viewing statistics demonstrating meaningful viewership in the hyphenated market) and its failure to submit any evidence of programming directed towards local issues in the hyphenated markets or communities within the ADI, suggests that WMCC-TV does not serve the market. There is no demonstrated "need" for redesignation.

Even assuming, arguendo, that WMCC-TV's claim of economic hardship from distant signal copyright charges was a cognizable rationale for redesignation of the market, WMCC-TV's hardship showing is woefully inadequate. The petition contains no firm estimate of anticipated charges associated with its carriage. In fact, while the petition cites the attached affidavit from WMCC-TV President Gerald J. Robinson for the proposition that the costs "would be prohibitively expensive" and "would result in the station's ceasing operation", the affidavit contains no such language or implication.

E. There is No Public Benefit to Redesignation

WMCC-TV has not shown any public benefit which would flow from market redesignation. WMCC-TV made no showing that it would provide programming not currently available on stations already received in those areas where WMCC-TV is not presently available; it submits nothing to indicate that the public even desires reception of its signal in those areas; it makes no showing that it produces or would produce programming of particular interest to those

communities; it neglects to include audience data supporting its redesignation request; and it makes no showing that its present programming addresses issues of concern to those communities.

In sum, WMCC-TV has completely failed to meet its burden of demonstrating that consolidation of the Marion television market into the Indianapolis-Bloomington hyphenated television market would serve the public interest.

II. WMCC-TV's Proposal May Conflict with the Results of Pending Copyright Office Rulemaking Proceeding

WMCC-TV's sole rationale for market redesignation stems from the copyright consequences of its inclusion in the hyphenated market. However, the copyright consequences of major market modifications are in a state of flux -- the Copyright Office has pending a proceeding designed to address the copyright repercussions of market redesignations.

In response to the Commission's new must-carry rules, the Copyright Office recently issued a Notice of Inquiry ["NOI"] seeking public comment on the copyright consequences of Section 76.51 and changes therein.^{13/} In that proceeding, the Copyright Office is considering the effect of redesignated markets on the cable compulsory license and royalty fee structure and whether it should adopt FCC redesignations. The Copyright Office stated that it "does not

^{13/} 58 Fed. Reg. 34594 (1993)(proposed June 28, 1993).

necessarily share the FCC's view that it has 'traditionally' followed changes in the § 76.51 list or that 'Congress intended for the FCC's updated § 76.51 list to be applied to assess copyright liability.'^{14/} Thus, the Copyright Office "considers it prudent to seek public comment" about the matter before making its ultimate decision.^{15/}

The FCC explicitly recognized the Copyright Office's undecided position on this issue in its must-carry proceeding Report and Order.^{16/} Although the FCC believes that Congress intended the Copyright Office to adopt FCC modifications to the § 76.51 list for copyright liability purposes, the Copyright Office itself, a separate federal agency vested with primary authority to determine copyright issues, ultimately must decide this issue.^{17/}

River City urges the Commission at a minimum to wait for the conclusion of the Copyright Office proceeding before acting on WMCC-TV's petition.^{18/} Because the Copyright Office's decision may moot WMCC-TV's

^{14/} 58 Fed. Reg. at 34596.

^{15/} Id. at 34596.

^{16/} Report and Order in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd. 2965, 2979 (1993) (¶ 53).

^{17/} Id. at ¶ 54.

^{18/} See LaRose v. FCC, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir 1974) (FCC, in making its own public interest determinations, should consider other federal policies to the extent possible).


request for market redesignation, Commission action on the petition at this time may yield inconsistent and improvident results.

CONCLUSION

The proposed redesignation of the Indianapolis-Bloomington television market fails to satisfy the criteria for such action and poses a potential conflict with a pending Copyright Office rulemaking proceeding. Accordingly, River City respectfully urges the Commission to reject WMCC-TV's request for redesignation of the Indianapolis-Bloomington television market to include Marion.

Respectfully submitted,

RIVER CITY LICENSE PARTNERSHIP

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing
"Comments of River City License Partnership In Opposition To the Rulemaking
to Add Marion I.N. To The Indianapolis-Bloomington Market (#16)" was mailed,
postage prepaid by first class mail, this 4th day of November, 1993 to the
following:

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A handwritten signature in cursive script, appearing to read "Reed Miller", is written over a horizontal line.